

# **WILLS / TRUSTS / GUARDIANS**

**OFFICE OF THE COMMAND JUDGE ADVOCATE**

**CAMP SHELBY JOINT FORCES TRAINING CENTER**

**CAMP SHELBY, MS.**

## **DO I NEED A WILL?**

Consider these questions and answers to help you decide whether you need a will.

### **Q: WHAT IS A LAST WILL AND TESTAMENT?**

A: A Last Will and Testament is the legal document which controls the disposition of your property at death and may provide for guardianship for your minor children after your death. A will is not effective until death. As long as you are living, your will has no effect.

### **Q: CAN MY LAST WILL AND TESTAMENT BE CHANGED?**

A: Yes. Changes to a will are made by drafting a new will and destroying the old one, or by adding a "Codicil." A Codicil is a legal document that must be signed and executed in the same manner as your will. NEVER MAKE ANY CHANGES TO YOUR WILL without consulting an attorney. Changes on the face of your original may make it invalid.

### **Q: WHAT IS MY LEGAL RESIDENCE?**

A: Your legal residence is the state in which you have your true, fixed, and permanent home and to which, if you are temporarily absent, you intend to return. Voting, paying taxes, owning property, and motor vehicle registration, are some indicators of one's legal residence. If you are a citizen of the United States, you must be a legal resident of some state. You cannot be a citizen at large. If you are a naturalized U.S. citizen, you are considered to be a resident of the state in which you were naturalized.

### **Q: IS MY LEGAL RESIDENCE IMPORTANT WITH REGARD TO MY WILL?**

A: Yes. Your legal residence affects where your will is probated and the amount of state inheritance or estate tax that may be paid at death.

### **Q: WHAT IS MY ESTATE?**

A: Your estate consists of all of your property and personal belongings you own or are entitled to possess at the time of your death. This includes real and personal property, cash, savings and checking accounts, stocks, bonds, real estate, automobiles, etc. Although the proceeds of insurance policies may be considered part of your estate, a will does not change the designated beneficiaries of an insurance policy. The proceeds of an insurance policy, although part of your estate for tax purposes, will normally pass to the primary or secondary beneficiary designated on the face of the respective policy.

**Q: WHAT IS AN EXECUTOR?**

A: An executor (executrix, if female) is the person who will manage and settle your estate according to the will. You should also consider naming a substitute executor in the event that the named executor is unable or unwilling to act as the executor of your estate. By the wording of your will, you can require that your executor or substitute executor be required to post bond or other security, or you can waive this requirement, thereby saving expense to your estate. The choice is yours.

**Q: HOW LONG IS A WILL VALID?**

A: A properly drawn and executed will remains valid until it is changed or revoked. However, changes in circumstances after you execute your will, such as tax laws, marriage/divorce, birth of children or even a substantial change in the nature or amount of a your estate, can affect whether your will is still adequate or whether your property will still pass in the manner you chose. All changes in circumstances require a careful analysis and reconsideration of the provisions of a will and may make it wise to change the will, with the help of your legal assistance officer.

**Q: TO WHOM SHOULD I LEAVE MY ESTATE?**

A: A person who receives property through a will is a "Beneficiary." You may leave all of your property to one beneficiary, or you may divide your estate among several persons. You may designate in your will that several different items of property or sums of money shall go to different persons. In any event, you should decide on at least two levels of beneficiaries: "Primary beneficiaries"- those who will inherit your property upon your death; and "Secondary beneficiaries"- those who will inherit your property in the event the "Primary beneficiaries" die before you. You may want to also select a third beneficiary in the event that both the primary and secondary beneficiaries die before you.

**Q: MAY A PERSON DISPOSE OF HIS PROPERTY IN ANY WAY?**

A: Almost, but not quite. For example, in most states, a married person cannot completely "disinherit" or exclude a spouse. Generally, you are free to give your property to whomever you desire. However, most states have laws that entitle spouses to at least part of the other spouse's estate. This "statutory share" ranges generally from 1/3 to 1/2 of the other spouse's estate. Some states, such as Louisiana, also provide shares of the estate to children of the decedent. Other provisions of the law may control insurance proceeds and jointly owned property.

**Q: SHOULD I NAME A GUARDIAN FOR MY CHILDREN IN MY WILL?**

A: It is advisable. Usually the surviving spouse is designated as the guardian of any minor children. By so naming the spouse in the will, you can sometimes relieve him or her of any requirement to post bond through a court. You should also name a substitute guardian. This would provide for a guardian for your children in the event that your spouse dies before you or you and your spouse die at the same time. This substitute guardian need not be the same person in both your will and your spouse's will.

**Q: HOW LARGE AN ESTATE IS NECESSARY TO JUSTIFY A WILL?**

A: Everyone who owns any real or personal property should have a will regardless of the present amount of his estate. Your estate grows daily in value through the repayment of mortgages, appreciation of real estate, stocks and other securities, inheritances from relatives, and other factors.

**Q: WHAT HAPPENS IF I DON'T MAKE A WILL?**

A: When you die without a will (or die "intestate," as the law calls it) your property is distributed according to a formula fixed by law. In other words, if you don't make a will, you don't have any say as to how your property will be divided. Usually a person would prefer that all of his estate, if it is not large, go to the surviving spouse. Most important for mothers and fathers, however, is not the disposition of their property after their death but rather the proper care and custody of their minor children. Grandparents, other family members and godparents do not automatically receive custody of children who do not have a surviving parent. Your will should specify the individual, as well as an alternate, you would like to designate as the guardian of your children. This decision on your part will be of great assistance to the court in determining who will receive the custody of your children.

**Q: WHAT HAPPENS TO PROPERTY HELD IN THE NAMES OF BOTH HUSBAND AND WIFE?**

A. Joint bank accounts and real property held in the names of both husband and wife usually pass to the survivor by law and not by the terms of the deceased's will. There are many cases, however, in which it is not to your advantage to hold property in this manner.

**Q: IS A LIFE INSURANCE PROGRAM A SUBSTITUTE FOR A WILL?**

A. No. Life insurance is only one kind of property which a person may own. If a life insurance policy is payable to an individual, the will of the insured has no effect on the proceeds. If the policy is payable to the estate of the insured, the payment of the proceeds may be directed by a will. The careful person will have a lawyer and a life insurance counselor work together on a life insurance program, as one important aspect of estate planning.

**Q: WHAT IF I STILL HAVE QUESTIONS REGARDING MY WILL?**

A: Ask them while your legal assistance officer is preparing your will. Be sure that you convey accurately your wishes for the distribution of your property to him or her.

## TESTAMENTARY TRUST

**Q: WHAT IS A TESTAMENTARY TRUST?**

A: A Testamentary Trust is a flexible estate planning tool. It is a written legal agreement between the individual creating it and the person or institution who is named to manage the trust's assets. The individual who creates a trust is called the grantor, or creator. The

trustee, or person who manages the assets, holds legal title to the assets for the benefit of one or more trust beneficiaries, who the grantor names.

**Q: WHERE CAN I ESTABLISH A TESTAMENTARY TRUST?**

A: In your will. This trust lies dormant until you die and your will is probated.

**Q: WHY SHOULD I USE A TESTAMENTARY TRUST IN MY ESTATE PLAN?**

A: Trusts are used for many purposes, including:

a. Managing Assets. The responsibility of making investment decisions can be transferred to an individual or institution with investment experience.

b. Providing Privacy. The assets, terms, and conditions of a trust are generally not subject to public inspection.

c. Providing for multiple beneficiaries. A trust can benefit more than one beneficiary and permit the trustee discretion in making distributions of the assets.

**Q: WHAT IS A TESTAMENTARY TRUST'S GOVERNING DOCUMENT?**

A: The written instructions listing the terms of the trust are contained in the will.

**Q: WHO ARE TRUST BENEFICIARIES?**

A: The beneficiaries are those you intend to enjoy the income and principal of trust property. If you name alternate or contingent beneficiaries, the governing document establishes the conditions under which the beneficiaries must receive trust proceeds. When the beneficiaries are young (minors), the trust may also provide for the continued management of the trust assets until the beneficiaries reach a certain age that you can determine.

**Q: WHAT IS THE NORMAL DURATION OF A TESTAMENTARY TRUST?**

A: Testamentary trusts have definite beginning and ending dates. Testamentary trusts begin on the date of death of the trust creator. In many trusts, the ending date is when the youngest beneficiary reaches an age specified in the governing document.

**Q: WHO SHOULD I CONSIDER NAMING AS A TRUSTEE?**

A: Because trustees have certain fiduciary duties, consider someone who, understandably, you "trust." Consider that person's age, expertise, ability to serve, and knowledge of the beneficiary's needs.

## GUARDIAN

**Q: WHAT IS THE PURPOSE OF APPOINTING A GUARDIAN?**

A: A guardian is appointed to assist with the personal and medical affairs, and day-to-day life, of a minor or a person impaired due to mental or physical illness or deficiency. Do not confuse "guardianship" with "conservatorship." Conservators are appointed specifically to manage financial affairs.

**Q: CAN A GUARDIAN AND A CONSERVATOR BE THE SAME PERSON?**

A: Yes. An incapacitated person (called a "ward") may have a guardian or a conservator, or both. Where there is both a guardian and a conservator, the same person might serve in both capacities.

**Q: WHAT NORMALLY HAPPENS WHEN I APPOINT A GUARDIAN?**

A: The basic procedure provides that a clerk of court will prepare a written document evidencing the guardian's authority to act as such. Certified copies normally are obtained and provided to interested parties such as schools, hospitals, and government agencies upon request.

**Q: DO GUARDIANS HAVE ANY FINANCIAL AUTHORITY OVER THEIR WARD?**

A: Normally, yes. Guardians normally have limited powers under state probate codes. Normally, guardians can receive and use current income for the ward's support and maintenance, and to pay off the ward's bills. Guardians normally may receive their ward's Social Security benefits, disability income and similar benefits, and may be asked to assist the conservator in devising a monthly budget and financial plan. Excess money should be turned over to the conservator, trustee, or other person responsible for the ward's overall finances.

**Q: WHAT RESPONSIBILITIES DO GUARDIANS HAVE TOWARD THE COURT?**

A: If there is a significant change in the ward's condition or situation, or if the guardian moves, he or she should promptly notify the court without waiting for the regular time to file a report. Unlike conservators, guardians aren't normally required to post bond or file a periodic financial accounting.

**Q: ARE GUARDIANS NORMALLY COMPENSATED?**

A: Normally, guardians are entitled to reasonable compensation for their services, payable from the funds of the ward. No compensation may normally be taken, however, without a court order. This compensation is taxable income to the guardian.

**Q: WHEN MAY GUARDIANSHIP BE TERMINATED?**

A: Guardianship may be terminated for a variety of reasons, such as death of the ward, when the ward reaches the age of majority, or when the ward's condition improves. None of these conditions automatically terminates guardianship, however. Court proceedings are necessary to relieve the guardian.